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Supreme Court of the United States

OCTOBER TERM, 1933

NO. 44

L. M. DAKIN (Successor to A. M. Anderson),
As Receiver of the First National Bank
of St. Petersburg, Petitioner,

vs.

TAVER BAYLY, As Liquidator of the
Peoples Bank of Clearwater, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT.

THOMAS HAMILTON,
Attorney for Respondent.

MELVIN A. McMULLEN,
CHESTER B. McMULLEN,
CYRIL E. POGUE,
GEORGE M. POWELL,
Of Counsel for Respondent.

TURNER PRINTING COMPANY, CLEARWATER, FLORIDA

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BRIEF OF RESPONDENT.

I

OPINION AND JUDGMENT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (Bryan, Circuit Judge) is reported in 63 F. (2) 592, and appears at page 20 in the record. The judgment of the United States District Court for the Southern District of Florida (Akerman, D. J.) is not reported, but appears in the record at page 16.

II.

JURISDICTION.

Writ of certiorari was granted May 29, 1933, (R. 23).

III.

STATEMENT OF THE CASE

We agree with counsel for the Petitioner that the statement of the case as contained in Petitioner's Brief is a fair and accurate statement of the case.

ARGUMENT

A SET-OFF SHOULD BE ALLOWED THE RESPONDENT, TAVER BAYLY, AS LIQUIDATOR OF THE PEOPLES BANK OF CLEARWATER, BECAUSE THE DRAFTS UPON WHICH JUDGMENT WAS RECOVERED IN THE DISTRICT COURT AND AFFIRMED BY THE CIRCUIT COURT OF APPEALS WERE MADE PAYABLE TO PEOPLES BANK OF CLEARWATER FOR A VALUABLE CONSIDERATION, AND BECAUSE THE PEOPLES BANK WAS ENTITLED TO SET OFF THE AMOUNTS OF THE DRAFTS AT THE TIME OF THE INSOLVENCY OF THE FIRST NATIONAL BANK OF ST. PETERSBURG.

(1) *The Uniform Negotiable Instruments Law discussed with reference to Section 6834 of the Compiled General Laws of Florida.*

It is necessary at the outset, in determining the rights of the parties to this suit, that the Court bear in mind that Section 6810 of the Compiled General Laws of Florida, which law was written into the Statutes of the State of Florida because of the Uniform Negotiable Instruments Law existing in practically all of the States in the Union, and which placed the State of Florida upon a uniform basis with the other States of the Union with reference to the handling, collection and payment of negotiable paper. The Section referred to is as follows:

> "The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument."

We sincerely urge that this Court keep clearly in mind that the Respondent here is attempting to set off certain drafts issued to it and made payable to it by the Petitioner at the time the petitioning Bank was solvent. Copies of the drafts attempted to be set off are shown on pages (5, 6 and 7 T of R.) By referring to the drafts in question the Court will note that each draft is unequivocally made payable to the order of Peoples Bank of Clearwater; that each draft is drawn on the Chase National Bank in New York; that each draft is endorsed without restriction by the Peoples Bank of Clearwater. It is alleged in the pleas (T of R 3, 4, 5) that said drafts were issued to the Peoples Bank for value and that said drafts were duly endorsed and presented for payment but the same were dishonored and refused because of the insolvency of Petitoner. It is admitted in the Brief of the Petitioner that a set-off in this case would be proper except for the fact of Section 6834 of the Compiled General Laws of Florida, which is as follows:

> "When a check, draft, note or other negotiable instrument is deposited in a Bank for credit or for collection, it shall be considered due diligence on the part of the Bank in the collection of any check, draft, note or other negotiable instrument so deposited to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks, and the maker, endorser, guarantor, or surety of any check, draft, note or other negotiable instrument so deposited shall be liable to the Bank until actual final payment is received, and when a Bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid."

It is sincerely urged by the Respondent that the Statute just above quoted is not a statute defining the ownership of negotiable paper in transit, but it is a Statute defining negligence on the part of a Bank, and the resulting liability of the Bank to its depositor when such negligence is established. A reading of the Statute itself clearly shows that the intention of the Legislature, when the Statute was enacted, was to define due diligence on the part of a forwarding bank, for the reason that the Statute itself sets forth the time, the manner and the method of accounting between the Bank and its depositors. It makes no attempt to nullify or to amend Section 6810 which defines the rights of holders of negotiable paper. It is the contention of the Respondent, that by virtue of Section 6810 of the Compiled General Laws of Florida, that the acceptance of checks from its depositors, as alleged in plaintiff's replication, (T of R 7, 8, 9, 10), which

checks were endorsed by the depositors, unqualifiedly and unrestrictedly, vested, in the Respondent, a right to enforce collection of the said checks in any legal manner it desired; that this Court should, in construing the applicability of Section 6834 of the Compiled General Laws, also keep in mind the rights that resulted to the Respondent by reason of the unrestricted endorsements; that in the enforcement of one section of the negotiable instruments law, that this Court must, if possible, give full faith and credit to other sections of the negotiable instruments law and must not ignore one section in order to enforce the provisions contained in the other section, unless such sections are of course conflicting and not capable of being reconciled.

The Supreme Court of Florida, in the case fo McCallum and Greeley vs. Driggs, 35 Fla. 277, 17 So. 407, at an early date defined the rights of a holder of a negotiable instrument to sue:

> "The law is now too well settled to admit of longer controversy that an action on a bill or note payable to bearer or endorsed in blank, may be maintained in the name of the nominal holder who is not the owner by the owner's consent; and that possession by such nominal holder is prima facie sufficient evidence of his right to sue and cannot be rebutted by proof that he has no beneficial interest, or by anything else but proof of mala fides. And, as has been said in Maryland courts: 'Courts will never inquire whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless in an allegation of mala fides, and the blank endorsement may be filled up at the moment of trial'."

Still later the Supreme Court of Florida in Brown vs. First National Bank of Panama City, 86 Fla. 198; 97 So. 351; clearly set forth the rights of a bank to paper which it held in due course.

> "The endorsement of the checks was unrestricted, and their endorsement and delivery gave the bank the legal title. By an almost unbroken line of decisions, this confers a right to sue thereon, even though the endorsee is in fact an endorsee for collection only. Such an endorsee is the real party in interest within the meaning of the Code. In such a case, courts will never inquire whether a plaintiff sues for himself or as trustee for another nor into the right of possession unless in an allegation of mala fides. 2 Daniel Neg. Inst. 1191."
>
> Citizens State Bank vs. Tessman & Co. 121 Minn. 34; 140 N. W. 178; 45 L. R. A. (NS) 606.

It thus follows as a logical conclusion that at the time the drafts were issued to the appellee and before the insolvency of the appellant, that the appellee could have maintained an action at law in the Florida courts against the appellant on the items herein sought to be set off, and that the Courts would not have permitted the appellant to defend on the theory which they are now using to attempt to defeat a set-off.

(2) *Elements of set-off discussed.*

The Petitioner, beginning with page 15 of his Brief, discusses very ably the fundamental requirements as to the

right of set-off. We agree that to entitle a Respondent to set-off certainly there must be a mutuality of parties coupled with a mutuality of right. We do not concede that it is a fundamental prerequisite that there must appear a mutuality in quality of right as the term mutuality of right is broad enough to cover mutuality in quality of right. However, in the instant case, we thing it is clear that there is a mutuality in quality of right as defined by the Petitioner. As to mutuality of parties, we only say that the pleadings disclose that at the time of the insolvency of the St. Petersburg Bank that said Bank was indebted to the Peoples Bank of Clearwater by reason of the issuance of its drafts; that the Clearwater Bank was indebted to the St. Petersburg Bank for moneys collected. The Petitioner attempts to show that the indebtedness of each Bank to the other was in a different capacity. We, therefore, call your attention to a reading of the pleadings (T of R 1 to. 10), which disclose that regardless of the position or regardless of the capacity in which Petitioner would have this Court place the Respondent, that in turn the Petitioner ultimately finds himself in the identical same position, for the reason that the indebtedness of each party one to the other arose out of the fact that each Bank had selected the other Bank as its correspondent; that each Bank had forwarded to the other Bank cash letters for collection and remittance drawn upon its own depositors; that each Bank had charged to the account of its various depositors the cash letters so forwarded to it; that each Bank had attempted to remit to the other for the cash letters so collected and had been prevented from doing so by the insolvency of the St. Petersburg Bank. We cannot conceive of a transaction between two parties more conclusively showing mutuality of parties than the transaction in this case as disclosed by the pleadings.

In a well reasoned case, the Supreme Court of Arkansas, when a Federal Reserve Bank filed a bill in equity to impress a trust upon funds of an insolvent bank for the amount of items sent by the reserve bank to the insolvent bank for collection, the defendant receiver raised the question of the right of the reserve bank to maintain the bill upon the ground that the items were deposited with the reserve bank for collection. The objection was disposed of in the following language:

> "We think, however, that the Reserve Bank had the right to sue. The Reserve Bank had been constituted the agent of the owners, and was the legal holder of the various items, all of which had been accepted and an abortive attempt had been made to pay. The agency was not discharged until the purpose of the agency had been accomplished, which was to make the collection and to remit the proceeds."

Rainwater v. Federal Reserve Bank, ——— Ark. ———; 290 S. W. 69, 71.

Since it is well settled that before insolvency the appellee could have maintained their suit against the appellant, upon the cause of action set forth in the pleas of set-off, we will now examine cases pertinent to the right of set-off generally.

The right of a bank to set off the matured indebtedness of an insolvent bank against claims of the insolvent bank against it are universally recognized. Both Federal and Florida Courts have approved such set-offs.

Camp v. First National Bank,
44 Fla. 497; —— So. ——.

Scammon v. Armstrong,
92 U. S. 362; 23 L. Ed. 483.

Scott v. Armstrong,
136 U. S. 499; 36 L. Ed. 1059.

Durkee v. National Bank of State of Florida,
42 C. C. A. 674; 102 Fed. 845.

George D. Harter Bank of Canton, Ohio v. Inglis
6 F (2nd) 841.

Hardley v. Clothier,
2 C. C. A. 349; 51 Fed. 506.

Hockway v. First National Bank,
36 F. (2nd) 166.

Storing v. First National Bank,
28 F. (2nd) 587.

16 Rose's Note, 2nd. Ed. Page 191,
Anno. to the case of Scott v. Armstrong, Supra.

Beal v. National Exchange Bank,
5 C. C. A. 304; 55 Fed. 894.

Wyman v. Fort Dearborn National Bank of Chicago,
181 Ill. 279; 48 L. R. A. 565.

Niblick v. Park National Bank,
169 Ill. 520; 39 L. R. A. 160.

Prudential Realty Company v. Allen,
241 Mass. 277; 25 A. L. R. 935 and Note.

Gerseta Corporation v. Equitable Trust Co.
241 N. W. 418; 43 A. L. R. 1320.

The Supreme Court of the United States in the case of Scott vs. Armstrong, 136 C. S. 499, defines the rule of set-off to be:

> "Where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt on the other."

Upon the precise point of mutuality the above decision is also conclusive, as the following quotation shows (Page 1062 of the Opinion).

> "In the case at Bar the credits between the banks were reciprocal and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credits, and the principle applicable to mutual credits applied. It was, therefore, the balance upon an adjustment of the accounts which was the debt, and the Farmers' Bank had the right, as against the receiver of the Fidelity Bank, although the note matured after the suspension of that bank, to set off the balance due upon its deposit account, unless the provisions of the national banking law were to the contrary. Wheth-

er this was so or not is the question on which the opinion of the district judge turned, and which was chiefly urged in argument upon our attention."

The plaintiff has dwelt at length at the argument and in his brief with reference to the distinction between the so-called Massachusetts and New York rule and we admit that Florida has adhered to the Massachusetts rule. We have found two cases which we think are precisely in point with this case; one from Pennsylvania and one from Montana, both of which states are committed to the Massachusetts rule.

Action was brought by the assignee of the Penn Bank against the Farmers Deposit National Bank to recover the sum of Twenty-three Thousand Two Hundred Eighteen and 59 / 100 ($23,218.59) Dollars, with interest, being the amount claimed to have been left on deposit by the Penn Bank with the defendant. The defense was payment and set-off. The set-off consisted of a Cashier's check for Eighty-eight Thousand ($88,000.00) Dollars, issued by the Penn Bank to the Germania Savings Bank, and deposited by the latter with the defendant. The defendant presented the check to the Penn Bank, but payment was refused. The Penn Bank thereafter closed its doors and made an assignment to one Henry Warner. The defendant charged back against the account of Germania Savings Bank the full amount of the cashier's check, but did not return the check. No other question was involved other than the right of the defendant to use the cashier's check as a set-off against the action brought to recover the deposit balance belonging to the Penn Bank. In reversing the lower court, the Supreme Court held:

"It is not denied that at the time of the failure of the Penn Bank and its assignment to Henry Warner for the benefit of creditors, the Farmers' Deposit Bank (defendant below) was the lawful holder of the check of the said Penn Bank for $88,000.00, and that it was such holder at the time of the trial below in a suit brought by assignee of the Penn Bank against the said Farmers' Deposit Bank to recover a balance of $23,218.59, admittedly due the Penn Bank at the time of its failure, the Farmers' Deposit Bank attempted to use the check of $88,000.00 as a set-off. The Court below instructed the jury that the latter bank could not so use it. This is the one error of the case and it runs all through it.

"The theory of this ruling was that the check belonged to the Germania Savings Bank and a large amount of time was wasted in trying this unimportant fact. Of what possible concern was it to the Penn Bank whether the defendant held it for collection or for value? It had no reference to the check in the hands of either bank. If there had been a defense as to the Germania Bank then the Penn Bank might have called upon the defendant to show that it had paid value. But as the case stood--with no defense as to either bank--it had no standing to inquire into the relations between the defendant and the Germania any more than if the check had been presented at its counter and payment demanded before its insolvency. If we concede that the defendant was a mere collecting bank, so far as this check was concerned, it does not alter the

case. As such its title was sufficient to maintain a suit in its own name.

"If it could maintain a suit on this check in its own name, it is difficult to see any good reason why it could not set the check off in a suit against it by the assignee of the Penn Bank. The rights of the assignee rise no higher than those of its assignor. Neither the Penn Bank nor its assigns have any concern with the question of the ownership of the check unless a defense be shown as against the Germania, or that the defendant became the holder after the assignment. As no defense was set up against the check in the hands of anyone and as it is an undisputed fact that the defendant became the lawful holder thereof several days before the assignment, we are all of opinion that the set-off should have been allowed."

Farmers Deposit Nat. Bank vs. Penn Bank
123 Pa. 283; 16 A. 761; 2 L. R. A. 273.

So we say what difference could it possibly make whether this defendant acquired the drafts in question as agent of its depositor or whether it owns the real and beneficial interest in said drafts. It occurs to us that the hairline distinction attempted to be set up by the plaintiff is merely a play upon words and should not receive serious consideration.

In a Montana case, the case of Clarke, Receiver, vs. National Bank of Montana, —— Mont. ——, 252 Pac. 373, decided in 1926, involves a similar state of facts. On May 19, 1924, Peoples Store of Manhattan was indebted to

Davidson Grocery Company, of Butte, Montana, in the sum of One Hundred Seventy-four and 15/100 ($174.15) Dollars, and on that date drew its check in favor of the Grocery Company on Home State Bank of Manhattan. The Grocery Company deposited this check in Metals Bank & Trust Company, of Butte, for collection. The latter forwarded the check to the defendant for collection and credit. The drawee bank having an account with the defendant, the latter credited the Metals Bank and charged the account of the Manhattan Bank with the amount of the check. On May 23, the defendant forwarded the check to the Manhattan Bank, which the latter failed to pay, having closed its doors on May 25. Thereupon the defendant reversed its entries, but upon insistence by the Metals Bank that the check had been accepted by failure of the Manhattan Bank to return the item within twenty-four hours, credit was again given the Metals Bank. By inference it appears all the credit balance due the Manhattan Bank from defendant was thereafter paid except the amount above mentioned represented by the check in dispute. This action was by the receiver of the Manhattan Bank to recover such balance. The defense was payment. After first ruling that the failure of the Manhattan Bank to return the check within twenty-four hours was an acceptance under the N. I. L., the court affirmed the judgment for the defendant, holding:

> "By this acceptance the Manhattan Bank became primarily liable for the amount of the check to the defendant as endorsee of the Davidson Grocery Company, 2%. C. L. 1144."
>
> "Upon the liability this created, the defendant could have maintained an action against the Man-

hattan Bank, and having paid the check by crediting the Butte Bank with the amount thereof, was entitled to set up such payment as a complete defense to the plaintiff's action."

In view of the above authorities as applied to the pleadings in this case, we cannot conceive of any question as to mutuality of accounts, and mutuality of parties. As the pleadings show, both appellant bank and appellee bank were engaged in the banking business in Florida for years prior to the insolvency of each of them. For a good many years the First National Bank of St. Petersburg remitted checks drawn on the Peoples Bank and other banks of Clearwater to the Peoples Bank for collection. Upon collections being made by the Peoples Bank, it in turn remitted its draft to the First National Bank. The Peoples Bank in turn forwarded to the First National Bank checks drawn by its depositors on said bank for collection and remittance, and the First National Bank collected and remitted by draft. Each bank used the same method in making the collection and each bank remitted to the other in the identical manner by draft. It so happened that the First National Bank of St. Petersburg became insolvent first. It now happens that both banks are being represented by a receiver and a liquidator. It is also clearly shown by the pleadings that the Peoples Bank was the agent of the First National Bank and the First National Bank in turn was the agent of the Peoples Bank. This brings us to the second point raised by the appellant in his brief.

(3) *Does a forwarding bank which forwards cash letters to a correspondent bank for collection and remittance, after the collecting bank has collected the items and remitted*

by draft, which draft is accepted by the forwarding bank as payment for the cash letters forwarded but which draft is not paid, acquire such an interest in the draft or in the debt represented by said draft as to permit the forwarding bank to use said draft as a set-off against a debt or obligation owed by the forwarding bank to the collecting bank?

It is undisputed between the parties to this suit and it is clearly revealed by the pleadings that the drafts which the Respondent herein is seeking to set off were forwarded to it by the First National Bank of St. Petersburg for moneys actually collected by the St. Petersburg Bank for the Peoples Bank of Clearwater. It is the contention of the Respondent that when the First National Bank of St. Petersburg actually collected the money represented by the cash letters forwarded the St. Petersburg Bank and charged back to the accounts of its own depositors, the checks forwarded to it, marked the checks paid, and returned the checks to its depositors, and then executed its draft to the Peoples Bank of Clearwater, and that later said drafts were accepted by the Peoples Bank as revealed by the pleas (T of R 3, 4, 5) that the legal effect of the acceptance by said Peoples Bank, of the drafts, constituted legal payment and that in this manner, the drafts were so accepted that payment had been received as fully as if cash money had been received, as far as the relationship between the Peoples Bank and its customers were concerned, for the reason that under Section 6834 of the Compiled General Laws of Florida, the Statute upon which the Petitioner relies in support of his theory that the Peoples Bank never at any time owned any interest in the drafts, the Peoples Bank had a right to receive as payment anything which it might have, in its own opinion, decided was payment. In other words, the forwarding Bank had the option and the

right to choose what, in its opinion, constituted payment; that under the section above set forth, the acceptance of the draft, upon which there is no question, changed the relation between the Peoples Bank and its depositors from the relation of trustee for its depositors or from the relation of principal and agent, if such relationship ever in fact existed, to a relationship purely of debtor and creditor. It is conceded throughout the Brief of the Petitioner that if it be shown that the relationship of debtor and creditor existed between the Peoples Bank and its depositors at the time of the insolvency of the First National Bank, then ownership of the draft cannot be questioned, and certainly the defense of set-off would be available to the Respondent. We respectfully, but sincerely, insist that at the time of the insolvency of the First National Bank, that the relation of debtor and creditor existed between the Peoples Bank and its depositors by reason of the fact that the Peoples Bank had accepted as payment the drafts of the First National Bank and also by reason of the provisions of Section 6810 of the Compiled General Laws of Florida.

In the case of Federal Reserve Bank vs. Malloy, 264 U. S. 160; 31 A. L. R. 1266; this Court held as follows:

> "Acceptance of the draft by the Richmond Bank as payment of the Malloy check, had the effect of releasing the drawer and therefore materially altering the relationships of the parties. Technically there resulted a transfer of the drawer's funds and his right of action against the drawee bank; and previous rights and obligations between the owners of the check and the drawer were superseded. It follows, this result having been brought about by the

> unauthorized act of the Richmond Bank standing in that transaction in the relation of agent to the owners of the check, that such owners are entitled to recover from the Richmond Bank for the loss which they sustained unless the case falls within some exception to the general rule."

The above case, decided by this Court, clearly holds that the acceptance of the drafts mentioned, by the Peoples Bank positively and unequivocally changed the relationship between all of the parties to the extent that the Peoples Bank's own depositors would have the right to sue the said Bank for moneys collected by it for its depositors. In other words, will this Court now, after the forceful and enlightening opinion in Federal Reserve Bank vs. Malloy, Supra, listen to the contention of the petitioner that the Peoples Bank owns no interest in the drafts attempted to be set off and at the same time hold that the acceptance of the draft amounted to payment within the terms of Section 6834 of the Compiled General Laws.

The presenting of a check for payment implies that the holder desires, and is ready and willing, to accept payment. Simpson v. Pacific Mut. L. Ins. Co. 44 Cal. 139; Noble v. Doughten, 72 Kan. 336, 3 L. R. A. (N. S.) 1167, 83 Pac. 1048. If the holder of a check procures it to be accepted or certified, the drawer and all indorsers are dicharged from liability thereon. Comp. Laws 1913, Paragraph 7072; Negotiable Instruments Law, Paragraph 188. If the holder or his collecting agent presents the check for payment, and the drawer has funds on deposit to meet it, which the drawee is then ready and willing to deliver, the contract of the drawer is fulfilled. 5 R. C. L. p. 498. If the holder, in-

stead of receiving money, causes the check to be deposited to the credit of his account in the drawee bank, the check is paid and the drawer released from liability thereon. Burton v. United States, 196 U. S. 283, 49 L. Ed. 482, 25 Sup. Ct. Rept. 243; First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766. And, if the holder, in lieu of money, accepts a draft from the drawee bank, such acceptance amounts to payment, and he takes the draft at his own risk, and not at the risk of the drawer of the check. Simpson v. Pacific Mut. L. Ins. Co. supra; Anderson v. Gill, 79 Md. 312, 25 L. R. A. 200, 47 Am. St. Rep. 402, 29 Atl. 527; Comer v. Dufour, 95 Ga. 376, 30 L. R. A. 300, 51 Am. St. Rep. 89, 22 S. E. 543; Loth v. Mothner, 53 Ark. 116, 13 S. W. 594; 2 Morse, Banks & Bkg. 5th Ed. Paragraph 426; Dan. Neg. Inst. Paragraph 1591.

(4) *The First National Bank of St. Petersburg, as a matter of law, is estopped to deny that the Peoples Bank of Clearwater is the owner of the drafts forwarded it.*

It is the Respondent's contention that the Petitioner cannot in good conscience deny that the Peoples Bank is the owner of the drafts forwarded it by the First National Bank of St. Petersburg for the reason that the First National Bank accepted the cash letters and checks forwarded to it by the Peoples Bank; It is admitted by all parties concerned that the First National Bank of St. Petersburg received the money which these checks and these items represented; It is conceded that the moneys were attempted to be paid to the Peoples Bank of Clearwater. These actual physical facts negative the idea that the First National Bank of St. Petersburg was responsible to the depositors of the Peoples Bank rather than to the Peoples Bank itself. Should the Court

sustain the contention of the Petitioner, we would have an unusual situation, and the liquidator of the Peoples Bank would find himself in this position: He would be forced to pay in cash all of the moneys collected by the Peoples Bank for the depositors of the First National Bank. At the same time he cannot charge back against the accounts of the depositors of the Peoples Bank moneys collected by the First National Bank on the cash letters forwarded to it by the Peoples Bank for the reason that it has accepted payment of said items by accepting the drafts; Federal Reserve Bank vs. Malloy, Supra. He cannot recover from the original makers of the checks for the reason that the First National Bank of St. Petersburg has marked them "paid", has debited the accounts of its depositors with the items represented by the checks and has cancelled and returned the checks to them. In other words, to sustain the Petitioner's position, this Court must hold that the Petitioner can recover all of the money owing to it by the Respondent and at the same time can retain in its vaults all sums of money which it has collected and owes to the respondent. We think for this reason clearly the Petitioner is estopped to deny that the ownership of the drafts is vested in the Respondent.

REBUTTAL

In rebuttal to the excellent and enlightening brief of the petitioner, we will only call the Court's attention to a few of the major contentions. As to the question of mutuality, we feel that we have discussed this thoroughly. We agree with the cases cited in the Petitioner's Brief as to the fundamental law on the question of mutuality and set-off. We think that the facts as revealed by the pleadings in the instant case clearly show every essential element necessary to show

mutuality of parties and of subject matter to entitle the defendant to a set-off. We do not think that the question of preference as raised by the Brief is proper to be discussed by either the Petitioner or the Respondent as the Respondent herein is not seeking in a court of equity to establish a preferred claim, but that the sole issue to be decided is purely a legal question of set-off. On the question of preference, the Petitioner very ably makes this statement on page 13 of his Brief:

> "It must be conceded that where the legal right to set-off exists, its allowance cannot be considered a preference."

We think this statement by the Petitioner is enough to convince the Court that the question of preference has not been raised by the pleadings in this cause.

The Petitioner relies very strongly on Thomas vs. Potter Title & Trust Company, 2 Fed. Supp. 12. We have read this case thoroughly and we cannot see nor do we concede that it is applicable to the facts in the instant case, as the Potter Title & Trust Company case is clearly based on the trust fund doctrine and decides the question of whether or not a trustee can set off his trust funds in payment of a purely personal obligation. The Court, very properly, in this case held that there was not mutuality of parties nor of subject matter. Consequently there was no legal basis for a set-off. We think that this case is good law, but we can not concede that it adds any weight to the petitioner's contention in the instant case for the reason that the facts are entirely different.

We respectfully call attention to the inconsistent positions which the Petitioner herein is requesting this Court to

take in deciding the case at bar. At the outset the Petitioner takes the position that the Florida Statute with reference to set-off, being Section 4326, Compiled General Laws of Florida,

> "All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects to set-off and may be pleaded accordingly"

should be ignored by this Court. We cannot concede that the Petitioner is correct in this for the reason that the Brief fails to enlighten the Respondent in what manner or in what way the above quoted statute is in conflict with any statute of the United States or with the Constitution of the United States. In the same breath, the Petitioner strongly urges that the set-off should be denied by reason of Section 6834 of the Compiled General Laws of Florida, which section, it is urged, controls the ownership of the drafts. We sincerely urge that should the Court ignore any of the Florida Statutes with reference to set-off, it should ignore both statutes. Should this Court take the position that neither statute is applicable, then there is no question as to the defendant's right of set-off for the reason that the ownership of the drafts is clearly vested in this Respondent. See City of Douglas vs. Federal Reserve Bank of Dallas, 271 U. S. 489, 70 L. Ed. 1051:

> "When paper is endorsed without restriction by a depositor and is at once passed to his credit by the Bank to which he delivers it, he becomes the creditor of the Bank, the Bank becomes owner of the

paper and in making the collection is not the agent for the depositor. Burton v. U. S. 196, U. S. 283, 49 L. Ed. 482."

In other words we do not see how this Court in passing upon the questions raised in this cause, can apply some of the provisions of the Florida Statutes and ignore other provisions bearing upon the subject. We believe that this judgment will be affirmed if this Court will bear in mind all of the statutory provisions of Florida which are pertinent, and we also believe that the judgment will be affirmed should the Court ignore all of the provisions of the Florida Statutes which are pertinent.

RECENT CASES DECIDED BY THE UNITED STATES CIRCUIT COURTS OF APPEAL OF THE SEVERAL CIRCUITS.

At this point we respectfully call to the attention of the Court cases which have within the past twelve months been decided by the Circuit Courts of Appeal on the identical question involved in this cause.

Nomland vs. First National Bank of Kansas City, Mo.

64 Fed. (2) 399.

In this case the Court held that the Uniform Negotiable Instruments Statute applied, and that a contract between the bank and its customer, which contract was set forth on the deposit slip and which was very nearly identical with Section 6834 of the Compiled General Laws of Florida, must of necessity be construed with reference to the Uniform Negotiable Instruments Law and that an unrestricted endorsement of the checks passed title to the Bank, and further held

that the Kansas Bank was the owner of the checks the moment the Stockton Bank collected them by simply making proper entries on their books. There arose between the Stockton Bank and the Kansas City Bank the mutual relation of debtor and creditor and consequently the right of set-off.

In the case of Bosworth, Receiver of the McCartney Nat'l Bk. of Green Bay, Wisconsin, vs. Continental Illinois Bank and Trust Company, 65 Fed. (2), 632, the Circuit Court of the Seventh Circuit in an opinion decided by Circuit Judge Evans decided the identical question now presented to this Court in the instant case; that in the opinion the Circuit Court used the instant case and the case of Nomland, Receiver, vs. First National Bank of Kansas City, Supra, as the legal basis for arriving at his decision. We therefore call attention to the fact that the case now presented to this Court has been presented to three of the Circuit Courts of Appeal, all within the past eighteen months; that in each instance the Circuit Courts of Appeal have decided favorably to the contentions of the Respondent here; that in each instance the law and the facts before the Courts are very nearly identical with the case at Bar.

CONCLUSION

In conclusion we call attention to the concluding paragraph of the opinion affirming the judgment in the instant case written by Circuit Judge Bryan (T of R 22)

> "In this case all the checks sent by each Bank to the other had been paid in full, and as a result the drawers of the checks had been discharged. It was no longer possible for either bank to return to

its depositors the checks which it had received from them. Each bank was the debtor in the same capacity that it was creditor. One was no more an agent than the other. If the Clearwater bank did not have the right to sue neither did appellant. In our opinion either Bank had the right to sue or to plead set-off if sued, because mutual debts were due to and from them in the same capacity. 24 R. C. L. 858. The judgment is affirmed."

We, therefore, respectfully submit that there is both mutuality in parties and subject matter as defined by the cases herein cited, and that the allowance of a set-off by this Court will not conflict with the prior rulings of this Court, but on the other hand will be in accordance with and conformity to the previous rulings of this Court and of the Courts of Last Resort of the several States, and that it will not adversely affect the interest of creditors of thousands of National banks, but on the other hand will lead to a uniform and orderly liquidation of those unfortunate banks which are now in the hands of the Comptroller of the Currency and his receivers.

It is respectfully submitted that the decision of the Lower Court should be affirmed.

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